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For participants only

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Provisional summary record of the 3445th meeting
Held at the Palais des Nations, Geneva, on Monday, 6 August 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
later:	Mr. Šturma (First Vice-Chair)
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

GE.18-13048

The meeting was called to order at 3 p.m.

Draft report of the Commission on the work of its seventieth session *(continued)*

Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued) (A/CN.4/L.917 and A/CN.4/L.917/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.917/Add.1.

Commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (5)

Mr. Murphy said that he wished to draw attention to an inconsistency in the final sentence, where there should be quotation marks around the words "subsequent practice".

The Chair said that the Secretariat would make the necessary editorial correction to that sentence and to any others where that problem occurred.

Mr. Nolte (Special Rapporteur) said that the Secretariat should check with him in each instance before making such corrections.

Paragraph (5) was adopted with a minor editorial change.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

Mr. Murphy proposed that, in the first sentence, the word "squarely" should be deleted, since the case referred to in that sentence addressed the issue in a relevant way but did not do so "squarely".

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Murphy proposed that, in the first sentence, the words "may suggest" should replace the word "suggests", in order to make it clear that the Commission was not making an assertion that might not necessarily be correct.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Sir Michael Wood said that the deletion of the words "their coincidental" in the first sentence would produce a more straightforward formulation.

Mr. Murphy said that, in paragraph (10), the Commission was referring to the possibility that different acts, when combined, could be viewed as an interpretation of a treaty. The two instances of the expression "common act" in the paragraph, however, appeared to exclude such a possibility. In order to avoid the implication that what was meant was a single common act or undertaking, he proposed to recast the first sentence so that it would read: "Subsequent agreements and subsequent practice under article 31, paragraph 3, are hence distinguished based on whether an agreement of the parties can be identified as such, through an undertaking or undertakings by the parties, or whether it is necessary to identify an agreement through practice that, in its coincidental combination, demonstrates an agreement." He also proposed that, in the second sentence, the words

"common act or undertaking" should be replaced with the words "undertaking or undertakings".

Mr. Park said that he was in favour of retaining the expression "coincidental combination" in the first sentence.

Mr. Nolte (Special Rapporteur) said that paragraph (10) concerned the distinction between subsequent agreements and subsequent practice. He had given considerable thought to its formulation, as had the Commission, and he would like to explain the reasons that had led him to use certain expressions. The word "coincidental" had been added partly in response to a concern expressed by Mr. Murphy in a different connection, where he had noted that subsequent practice could establish agreement, even though, in some cases, the parties were unaware of each other's parallel practice. The expression "common position" was taken from the *travaux préparatoires* of the 1969 Vienna Convention on the Law of Treaties. It was an expression that was used to describe the form of agreement that subsequent practice could generate and was therefore not an unusual one.

The distinction that Mr. Murphy was trying to draw between "undertaking" and "undertakings" was unclear. It was admittedly a difficult issue, and there were different ways of formulating it. If Mr. Murphy did not insist on his proposal, he would prefer to keep the text as it stood. However, he was willing to accept the deletion of the words "their coincidental" because the words "in combination" did, in a sense, imply the same thing. However, the word "coincidental" made it clearer that the combination in question was not preconceived, so he would prefer to retain it, if that was acceptable.

Mr. Murphy said that he was open to retaining the words "common position" and had no problem with "common understanding", provided that what was intended by those expressions was the agreement of all the parties. His concern had to do with the expression "common act or undertaking". That was because paragraph (10) referred to both subsequent agreement and subsequent practice and because subsequent practice could be in the form of individualized practice that evidenced a particular interpretation but that was not common. His proposal to use the expression "undertaking or undertakings" was an attempt to ensure that the Commission was acknowledging that there might be subsequent practice in the form of individualized, and not common, conduct. He was open to other alternatives, but he did feel strongly about that aspect of the wording.

Mr. Nolte (Special Rapporteur) said that he wondered whether Mr. Murphy's concern might be addressed by using the expression "in a common act or undertaking". That would cover the case where States acted or expressed unilateral declarations in a coordinated fashion that amounted to a subsequent agreement — a process that was typically provided for in treaties or expected in connection with treaties. That would allow for retention of the expression "common act", which was the usual way of expressing a subsequent agreement, along with "common undertakings", which referred to bringing undertakings together in a coordinated way, while simultaneously remaining distinct from the coincidental way in which subsequent practice was produced to achieve a common understanding.

Sir Michael Wood said that the first part of the first sentence was correct and should be retained as it stood. The second part was obscure, however, because the word "coincidental" was ambiguous and had two possible meanings: happening by chance or happening at the same time. Accordingly, he proposed that, in the first sentence, "different acts" should be replaced with "separate acts" and the words "their coincidental" should be deleted, so that the clause would read "or whether it is necessary to identify an agreement through separate acts that, in combination, demonstrate a common position".

Mr. Murphy said that he was open to Sir Michael Wood's proposal for the second part of the first sentence, but the point being made in the first part related to the North American Free Trade Agreement (NAFTA) example that had just been discussed in paragraph (8): the point was that different acts or undertakings could be put together to establish the existence of a subsequent agreement. His concern was that the expression "a common act or undertaking", in which both nouns were in the singular, implied that the establishment of a subsequent agreement was limited to a situation involving a single instrument, which was not the case.

Mr. Nolte (Special Rapporteur) said that he could live with Sir Michael Wood's proposal, although it removed a little of the clarification that was intended. Mr. Murphy's reference to the NAFTA case was not entirely accurate because the quote in paragraph (8) referred not to a subsequent agreement but to an agreement based on the subsequent practice of different actors, which had arisen through different, coincidental or fortuitous acts. The expression "common act or undertaking" was therefore correct. He would be in favour of adopting the paragraph with the amendments proposed by Sir Michael Wood.

The Chair invited the Secretary to read out the text with the proposed amendments.

Mr. Llewellyn (Secretary to the Commission) said it had been proposed that the first sentence should be amended to read: "Subsequent agreements and subsequent practice under article 31, paragraph 3, are hence distinguished based on whether an agreement of the parties can be identified as such, in a common act or undertaking, or whether it is necessary to identify an agreement through separate acts that in combination demonstrate a common position."

Mr. Nolte (Special Rapporteur) said that it was his understanding that the second sentence of the paragraph should remain unchanged.

Mr. Murphy said he wished to clarify whether all Commission members were in agreement that a common act or undertaking could take the form of multiple instruments, as indicated, for example, in the last sentence of footnote 88, which read: "A common act may consist of an exchange of letters." If that was the case, then he would like to propose the insertion of a footnote to the first sentence, where the expression "common act or undertaking" appeared, to clarify how the Commission viewed the concept of a common act, since it obviously did not view it as a single act. The footnote could read: "A common act or undertaking may consist of an exchange of letters or some other form of agreement."

Mr. Nolte (Special Rapporteur) said that he agreed with the inclusion of the proposed footnote. However, the idea expressed in the footnote was that an exchange of letters could constitute a subsequent agreement; since the second sentence was the one that explained what a subsequent agreement was, he would prefer to have the footnote placed at the end of that sentence, which was also the end of the paragraph.

The Chair said he took it that the Commission wished to adopt Sir Michael Wood's proposal for the second part of the first sentence and to include Mr. Murphy's proposed footnote, with the footnote indicator inserted at the end of the paragraph.

It was so decided.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

Mr. Park said that he proposed to delete the word "single" in the first and final sentences, as the Special Rapporteur had done in other parts of the text.

Mr. Murphy said that the words "single agreement" made sense in the second sentence because the point being made was that, although it was possible among a group of States parties to have subsets of parties reaching agreements on the interpretation of the treaty, those individualized agreements did not constitute a single agreement of all the parties to the treaty. However, in the final sentence, the formulation "limited to agreements among all the parties to a treaty that constitute one single agreement" was very confusing. He proposed to simplify the final sentence by amending it to read: "Thus, the use of the term 'subsequent agreement' is limited to an agreement among all the parties to the treaty." That formulation was a direct statement of what the Commission intended and was a good summary of what had been stated previously in the paragraph.

Sir Michael Wood proposed the deletion of the paragraph, as he found it to be complicated and dogmatic, and he wondered whether the Commission should be

committing itself to all the propositions it contained. He did not see that much, if anything, would be lost by its deletion.

Mr. Nolte (Special Rapporteur) said that, in the case of a treaty with many parties, the conclusion of various separate agreements between a limited number of States parties did not constitute a subsequent agreement that established the agreement of all the parties. That was a pretty straightforward proposition and was neither doctrinal nor dogmatic.

In light of the discussion on paragraph (10), and in order to address Mr. Park's concern, he proposed that, in the second sentence, the words "single agreement" should be replaced with "common act or undertaking". With regard to the final sentence, he proposed the deletion of the words "that constitute one single agreement — or", so that the end of the sentence would read "among all the parties to a treaty in a common act in whatever form that reflects the agreement of all parties". That formulation would also meet Mr. Murphy's concern and would be consistent what had been decided with regard to paragraph (10).

Mr. Saboia said that he, too, considered that paragraph (12) could be deleted. However, he would not insist on its deletion if the Special Rapporteur wished to retain it.

Mr. Rajput said that, given that the Commission was speculating as to whether a subsequent agreement was limited to a single agreement or could result from more than one agreement, the possibility existed that it might not be limited to a single agreement. Therefore, one good compromise that would reconcile Mr. Park's and Mr. Murphy's respective views might be to rephrase the final sentence so that it would read: "Thus, the use of the term 'subsequent agreement' is limited to an agreement among all the parties to a treaty or in a common act in whichever form reflects the agreement of all parties." He agreed, however, with Mr. Murphy's point about retaining the existing wording in the second sentence.

Mr. Murphy said that he would have no problem with deleting the paragraph; however, if the Commission decided to retain it, he was opposed to reintroducing the expression "common act or undertaking" in the second sentence. What the Commission was trying to convey was that multiple agreements were not good enough, but a single agreement was good enough. It was therefore clouding the issue to then start contrasting the idea of multiple agreements with a common act or undertaking. He agreed with Mr. Rajput's proposal to delete the phrase "that constitute one single agreement —", but he would simply place a full stop after the phrase "an agreement among all the parties to a treaty", as it adequately captured the Commission's point.

Sir Michael Wood said that he did not understand why the assertion made in the first sentence should be accepted as true; nor did he understand what was meant by the word "normally" in that sentence. The second sentence was equally difficult, and he did not see why the assertion made in it should be accepted as true either. Those statements appeared to come out of nowhere, and he could not see the point of the paragraph.

Mr. Nolte (Special Rapporteur) said that the point being made in the paragraph was that a group of separate subsequent agreements between a limited number of parties to a treaty could not establish an agreement between all the parties. The replacement of the phrase "single agreement" in the second sentence with "common act or undertaking" should resolve all problems. It was the purpose of the commentary to address that possibility, which existed in practice; it was not doctrinal speculation.

Mr. Murphy said that, as he saw it, the Commission was claiming that individual agreements concluded among different groups of parties to a treaty, which, taken together established the agreement of all the parties on the interpretation of the treaty — thus, even if all the parties were "in play", so to speak — still did not constitute a subsequent agreement. Sir Michael Wood's question had been "why not?". His own question was whether that claim was correct.

Mr. Nolte (Special Rapporteur) said that the reason why the word "normally" had been included in the first sentence was that paragraph (12) elaborated on paragraph (10). Different acts which, in combination, demonstrated a common position could be a form of subsequent practice under article 31 (3) (b) of the 1969 Vienna Convention, whereas

individual agreements reached among a limited number of parties at different points in time would not constitute a subsequent agreement under article 31 (3) (a) of the Convention.

Mr. Rajput said that the speculative nature of the paragraph might come back to haunt the Commission, because no instances of treaty practice, or any other practice, were cited in support of it. The only case law cited was that mentioned in footnote 88. He was therefore somewhat concerned that, if the paragraph was retained, the Commission might have trouble justifying it in the future, or that it might even hinder possible future development that was contrary to it. It should therefore be deleted.

Mr. Nolte (Special Rapporteur) said that the paragraph, which was virtually the same as that adopted on first reading, had already been scrutinized by the Commission. However, he suggested that it should be held in abeyance while he held informal consultations with several members.

It was so decided.

Paragraph (13)

Sir Michael Wood suggested that, in the first sentence, "must be" should read "is" and that, in the second sentence, the word "purport" should be replaced with "intend".

Paragraph (13), as amended, was adopted.

Paragraph (14)

Mr. Rajput said that he was curious about the practice of referring to separate opinions of judges, especially when they were essentially dealing with facts. He was unsure whether the last two sentences really fitted into the text. He wondered if the Special Rapporteur would be amenable to deleting them.

Mr. Nolte (Special Rapporteur) said that he would agree to move the last two sentences to footnote 91, on the understanding that the Commission did not make a habit of shifting parts of a commentary to a footnote.

Paragraph (14), as amended, was adopted.

Paragraphs (15) to (18)

Paragraphs (15) to (18) were adopted.

Paragraph (19)

Mr. Murphy said that the last two sentences of the paragraph made odd claims about the manner of thinking about subsequent practice. It was not obvious that any subsequent practice should necessarily be regarded as being in good faith. Nor was it obvious how manifest misapplication was to be determined. As those two sentences raised more questions than they answered and were not germane to the basic point made in the paragraph, they should be deleted.

Sir Michael Wood said that he agreed with Mr. Murphy and noted that no authorities had been given for those two sentences. In the preceding sentence, the term "national legislation" should be replaced with "internal legislation" for the sake of consistency with the earlier reference to "internal law".

Mr. Rajput said that, while he agreed with the Special Rapporteur that an element of good faith was implied in subsequent practice, it would have been helpful if a reference to international jurisprudence had been added at the end of the sentence to buttress that position.

Mr. Nolte (Special Rapporteur) said that it was surprising that a reference to case law should be requested for such an obvious statement. It went without saying that treaties should be applied in good faith. The purpose of the sentence, which had been approved on first reading, was to reduce the possibility that States might attempt to interpret a treaty on the basis of a manifest misapplication thereof. There had to be a limit to what a State could

term an application of a treaty, and the expression "manifest misapplication" was therefore apt in the context. For that reason, he saw no reason to delete the last two sentences.

Mr. Murphy said that he could agree to wording along the lines of "States parties, when applying a treaty, must act in good faith" in the penultimate sentence. However, what the sentence actually suggested was that, whenever a State was acting in the application of a treaty, good faith must be implied. He considered that to be wrong. He appreciated the Special Rapporteur's explanation of the following sentence, but it still did not clarify who or what could decide that there had been manifest misapplication.

Mr. Rajput said that he saw Mr. Murphy's point. His concern might be addressed by replacing "an element of good faith is implied" with "an element of good faith is necessary".

Sir Michael Wood said the last two sentences suggested that there was some argument to be advanced regarding good faith. For example, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, South Africa could have argued that the accepted interpretation of Article 27 of the Charter of the United Nations was in bad faith because it was obviously wrong. The Court had, however, found that that interpretation had been accepted for many years and therefore evidenced general practice. For that reason, the reference to good faith in the commentary was not helpful.

Mr. Nolte (Special Rapporteur) said that, in the case cited by Sir Michael Wood, South Africa had not argued that all other States were manifestly misapplying the Charter or that they were acting in bad faith. A better example would be needed to call those two sentences into question. He would be grateful if the current exercise was not turned into a debate where the Special Rapporteur had to demonstrate and prove yet again that two sentences which had already been approved by the Commission made sense.

The Chair said that the Special Rapporteur's concern was understandable. As the commentaries had already been adopted by the Commission on first reading and had been submitted to States, which had not reacted to some of the points raised in the current debate, there should be an assumption that the commentaries reflected a position on which all members had agreed.

Mr. Park said that he supported the position of the Special Rapporteur in the light of paragraph (2) of the commentary to draft conclusion 5.

Mr. Tladi said the fact that the Commission had adopted the commentary on first reading was not a reason not to take a close look at it again. The Commission wished to adopt the best possible product. If there was something that it had missed on first reading, it should reopen the debate in order to improve the text.

Mr. Nolte (Special Rapporteur) said that he was simply asking the Commission to abide by its own procedure. The text had not only been adopted on first reading; the topic had followed the Commission's classic, traditional procedure of adoption of the individual draft conclusions with commentary followed by their submission to States for their consideration. States had had three opportunities to comment on or object to the draft conclusions and commentary thereto. He agreed with Mr. Tladi that in principle any point could be raised for discussion until the final adoption of the text, but the text had already been examined by almost all the members who had taken part in the debate on the topic in 2016.

Mr. Murphy said that he agreed with Mr. Tladi that the goal was to have the best possible commentaries. The Special Rapporteur had made six changes to the paragraph adopted on first reading, none of which were based on Governments' reactions. He had done a fine job in seeking to improve on the text approved two years earlier; all those members who were contributing to the current debate were simply trying to do the same. He hoped that the Special Rapporteur was at least open to the amendment proposed by Mr. Rajput, because it captured the idea that States must act in good faith.

The Chair said he took it that the Commission wished to replace "an element of good faith is implied" with "an element of good faith is necessary", and "national legislation" with "internal legislation".

It was so decided.

Paragraph (19), as amended, was adopted.

Paragraph (20)

Mr. Murphy suggested that the beginning of the first sentence should read: "The requirement that subsequent practice in the application of a treaty under article 31, paragraph 3 (b), must establish an agreement 'regarding its interpretation'…"

Paragraph 20, as amended, was adopted.

Paragraph (21)

Mr. Ouazzani Chahdi questioned the use of the word "*envisagée*" in the French version of the text.

The Chair proposed that the French translation service should be requested to find a more appropriate term.

Paragraph (21) was adopted on that understanding.

Paragraph (22)

Paragraph (22) was adopted.

Paragraph (23)

Sir Michael Wood said that, at the end of the second sentence, "[1]" should be deleted. In the third sentence, for the sake of clarity, the phrase "to the draft articles on the law of treaties" should be inserted after "the commentary of the Commission". In the editorial intervention in square brackets in the third sentence of the quotation, "of what became" should read "which became".

Paragraph (23), as amended, was adopted.

Paragraph 24

Sir Michael Wood said that, in the first line, it would be neater to replace "as it is contained in" with "as does".

Mr. Murphy said that he understood that sentence to mean that paragraph 3 did not enunciate some kind of new requirement, because it was already contained in article 31 of the 1969 Vienna Convention, whereas the amendment suggested by Sir Michael Wood seemed to say something different. He wondered if it would be possible to delete the beginning of the sentence and to start with the phrase "Article 31, paragraph 3 (b), provides that the relevant practice …". The next sentence would then begin "Thus, for the purposes of the third paragraph of draft conclusion 4".

Mr. Nolte (Special Rapporteur) agreed with the amendment proposed by Sir Michael Wood, because the purpose of that section of the commentary was to explain subsequent practice under article 32 and article 31 (3) of the 1969 Vienna Convention. It therefore made sense to say, in an introductory sentence, that paragraph 3 did not include a requirement that was already contained in article 31 (3) of the Convention.

Sir Michael Wood said that, in that case, it would be clearer to say "Paragraph 3 of draft conclusion 4 does not contain a requirement like that in article 31, paragraph 3 (b)".

Paragraph (24), as amended, was adopted.

Paragraph (25)

Sir Michael Wood suggested deleting the first word, "This". Noting that, after the quotation, the paragraph referred to the jurisprudence of the World Trade Organization (WTO) Dispute Settlement Body, he said it might be preferable to replace the words "and ultimately even", which seemed rather harsh, with "including".

Mr. Nolte (Special Rapporteur) said the reason for the wording "ultimately even" was to be found in paragraphs (33) and (34) of the commentary to draft conclusion 4: initially, the WTO Dispute Settlement Body had not recognized that subsequent practice which fulfilled all the conditions under article 31 (3) (b) of the 1969 Vienna Convention was not the only form of subsequent practice by parties in the application of a treaty that might be relevant for the purpose of treaty interpretation, but ultimately it had done so.

Mr. Rajput said that in order to maintain the original thrust of the sentence, it might be advisable simply to delete "and ultimately".

Mr. Murphy said that the amendment suggested by Sir Michael Wood was a good one. The text had not yet dealt with the determinations of the WTO Dispute Settlement Body. The erroneous impression was therefore created that the Commission was saying something about the status of WTO *vis-à-vis* the International Court of Justice, as though there was something strange about WTO. He would therefore be in favour of deleting the word "itself".

Mr. Nolte (Special Rapporteur) said that it was necessary to explain the reference to the WTO Dispute Settlement Body at that point in the text and to make it plain that its jurisprudence was relevant to the discussion of subsequent practice, although at first that might not seem to be the case. Mr. Rajput's suggestion was a helpful compromise. He could agree to the deletion of "itself", if Mr. Rajput's suggestion was retained.

Paragraph (25), as amended, was adopted.

Paragraph (26)

Paragraph (26) was adopted.

Paragraph (27)

Mr. Park suggested the deletion of the word "State" in the first sentence.

Mr. Rajput, supported by **Mr. Saboia**, said that the paragraph dealt with the very serious issue of whether minority shareholders could file claims in an investment arbitration case. The accepted position was that the admissibility of such claims depended on the treaty itself. Paragraph (27) tried to contend that it had become State practice to allow such claims, whereas paragraph 48 of the decision of the International Centre for the Settlement of Investment Disputes in *CMS Gas Transmission Company v. the Republic of Argentina* indicated that minority shareholder claims were allowed under specific treaty arrangements. Paragraph (27) therefore contradicted some highly specialized jurisprudence and should be deleted for that reason.

Mr. Nolte (Special Rapporteur) said that Mr. Rajput and Mr. Saboia were referring to a highly controversial substantive issue, but paragraph (27) merely said that State practice in the area of investment disputes had been used as a means of interpretation. That did not prejudge the outcome of any such dispute. He would be happy to include a reference in the footnote to paragraph 48 of the aforementioned decision, which did not contradict the contents of paragraph 47 thereof. He could agree to the deletion of "State" in the first line, although it had been included because the quotation started with the term "State practice". He would prefer to retain the paragraph, as he failed to understand why it created difficulties.

Mr. Rajput said he felt very strongly that the paragraph should be deleted, because the case in question did not really turn on subsequent agreements or subsequent practice. In the paragraph quoted, the Tribunal had made an off-the-cuff remark about an apparent practice. Anyone who wanted to seek guidance on subsequent practice or subsequent agreements was going to use the Commission's product. For that reason there was a

possibility that the paragraph quoted by the Special Rapporteur could be used to argue that subsequent practice existed to the effect that even minority shareholders had rights, despite substantial jurisprudence to the contrary. The Commission would therefore be creating a very tricky situation with which some States and tribunals would not be comfortable.

Mr. Nolte (Special Rapporteur) said that he was concerned that, if a case was quoted where subsequent practice played a role in interpretation, every member who disliked the outcome of the case could refuse to have it cited, because it might support a particular position. That would be a dangerous precedent. However, he was prepared to delete the paragraph on an exceptional basis, despite the fact that it was fully justified and did not prejudge the Commission's position on whether minority shareholders had rights. Whether or not that was the case depended, of course, on the investment treaty in question.

Paragraph (27) was deleted.

Paragraphs (28) and (29)

Paragraphs (28) and (29) were adopted.

Paragraph (30)

Mr. Jalloh suggested that, in the first sentence, the word "under" should be changed to "established by" in line with the wording of the International Covenant on Civil and Political Rights, to which reference was made.

Paragraph (30), as amended, was adopted with a minor editorial change.

Paragraph (31)

Sir Michael Wood queried whether the example of the *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)* case given in paragraph (31) was wholly relevant to the definition of subsequent practice under article 32 of the 1969 Vienna Convention on the Law of Treaties, on which paragraph 3 of draft conclusion 5 focused. The law on the use of force, referred to by the International Tribunal for the Law of the Sea in that case, was part of customary law, not a provision of the United Nations Convention on the Law of the Sea. As such, the Tribunal had not used subsequent practice in the application of that treaty in the interpretation thereof.

Mr. Nolte (Special Rapporteur) said that the reference in the Tribunal's judgment to "normal practice used to stop a ship" appeared to concern practice under the Convention in question. As not all States had had occasion to stop ships, it probably did not reflect the practice of all parties thereto, but it would constitute practice under article 32 of the 1969 Vienna Convention. If the term "use of force" gave cause for concern, alternative wording might be found.

Ms. Oral recalled that, as the Tribunal had noted in its judgment in the *M/V "SAIGA" (No. 2)* case, the Convention on the Law of the Sea contained no express provisions on the use of force in the arrest of ships, but that international law, applicable under article 293 of the Convention, required that the use of force must be avoided as far as possible.

Sir Michael Wood suggested that the Tribunal had applied other rules of international law, as it was permitted to do under article 293 of the Convention, and that the practice therefore related not to the Convention but to customary international law.

Mr. Rajput, echoing Sir Michael Wood's comments, said that some scholars had seen the case as concerning domestic practice of States in the exercise of policing powers, rather than international practice under treaties, and asked how the Special Rapporteur intended to address both that point.

Mr. Murphy, drawing attention to article 301 of the Convention on the Law of the Sea on the peaceful uses of the seas, which stipulated that States parties to the Convention should refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations, said that, in relation to the *M/V "SAIGA" (No. 2)* case, the salient point was whether the Tribunal had been

interpreting that article or seeking an alternative source of law, as permitted under article 293; if the latter, Sir Michael Wood's point stood.

Mr. Tladi said that Ms. Oral's explanation confirmed Sir Michael Wood's point.

Mr. Nolte (Special Rapporteur) acknowledged that the matter was not clear cut, although he believed the Tribunal had been applying the Convention on the Law of the Sea, which in a sense incorporated other international law; however, in the interests of compromise, the paragraph could be deleted.

Paragraph (31) was deleted.

Paragraph (32)

Paragraph (32) was adopted.

Paragraph (33)

Sir Michael Wood expressed doubt about the relevance of the quotation in paragraph (33) to article 32 of the 1969 Vienna Convention.

The Chair said that, in the absence of any other comments, he took it that the Commission agreed to retain the paragraph as drafted.

Paragraph (33) was adopted with a minor editorial change.

Paragraphs (34) to (37)

Paragraphs (34) to (37) were adopted.

Commentary to draft conclusion 5 (Conduct as subsequent practice)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy said that, as drafted, the paragraph might lead to a misinterpretation of the position taken by the International Court of Justice in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* with regard to whether the conduct of a local tribe could in itself constitute subsequent practice in the application of a treaty, which was not the case. To make the Court's position entirely clear, he suggested that, in the first sentence, the phrase "constitutes an example of State practice" should be replaced with "can be relevant for determining subsequent practice", and "has been identified by the International Court of Justice" with "may be seen". He also suggested that, in the second sentence, the words "relevant when identifying" should be inserted after "could be regarded as".

Mr. Nolte (Special Rapporteur) said that he could accept the amendments to the first sentence suggested by Mr. Murphy, but that his amendment to the second would dilute the Court's ruling to an unacceptable degree.

Mr. Rajput suggested that the first sentence could be altered to read: "In certain situations, relevant conduct that does not directly arise from the conduct of the parties, may constitute an example of State practice, as has been identified by the International Court of Justice in the *Kasikili/Sedudu Island* case."

Mr. Murphy, expressing the view that Mr. Rajput's suggestion would not provide the necessary clarification, said that he welcomed the Special Rapporteur's acceptance of his suggested amendments to the first sentence but wished to emphasize that his proposed amendment to the second had merely been intended to clarify the Court's position that the conduct of the local tribe did not constitute subsequent practice under article 31 (3) (b) of the 1969 Vienna Convention without a belief on the part of the authorities of one party, accepted by the authorities of the other, that such conduct confirmed the boundary between them established by treaty.

Sir Michael Wood said that the current wording of the first part of the paragraph seemed to place too great an emphasis on the distinction between the conduct of the local tribe and the endorsement of that conduct by one of the parties. He suggested that it should be changed to: "An example of relevant conduct that arises only indirectly from the conduct of the parties, but nevertheless gives rise to State practice, has been identified …"

Mr. Jalloh, expressing support for Mr. Murphy's remarks, said that the commentary should be amended to reflect the comments received from the Government of the United States of America, which claimed that the Commission had misread the Court's judgment in the *Kasikili/Sedudu Island* case. Sir Michael Wood's suggested change would also improve the paragraph.

Mr. Tladi said that, as the case was relied upon heavily in the commentary, it was particularly important to reflect the Court's position clearly and faithfully. He could accept either the suggestions made by Mr. Murphy or Sir Michael Wood's proposal, though in the latter case he would prefer the words "gives rise to" to be altered to "might give rise to".

Mr. Saboia said that he could accept Sir Michael Wood's proposal. With regard to Mr. Jalloh's point, observations made by States after the first reading of a text did not oblige the Commission to change it: the final decision rested with the Commission, informed by the Special Rapporteur for the topic. The *Kasikili/Sedudu Island* case was undoubtedly relevant in the context; similar situations might be identified in relation to indigenous peoples in the Americas enjoying a certain legal status. In that respect, he supported the position of the Special Rapporteur.

Mr. Nolte (Special Rapporteur), emphasizing the need to take a broader view, said that, read as a whole, the paragraph accurately reflected the Court's position in the *Kasikili/Sedudu Island* case. Mr. Murphy's second suggested amendment introduced an element that was not present in the Court's reasoning. In order not to prolong the debate further, he suggested that the paragraph could be adopted with the amendment suggested by Sir Michael Wood, as further altered by Mr. Tladi.

Mr. Jalloh expressed support for that course of action, in view of the Special Rapporteur's explanation.

Mr. Murphy said that Sir Michael Wood's suggestion seemed an acceptable basis on which to move forward; however, the link to the second part of the paragraph still required further clarification. It was essential to avoid any implication that the conduct of the local tribe could be regarded as subsequent practice in and of itself.

The Chair suggested that altering the words "the Court considered that" in the second sentence of the paragraph to "the Court considered whether" might meet that concern.

Mr. Murphy, supported by **Mr. Jalloh**, said that such an approach would be acceptable, though additional changes would be needed to ensure a correct grammatical structure.

Mr. Nolte (Special Rapporteur) suggested that changing the words "if it", which introduced the quotation, to "and found that this would be the case if it" might serve that purpose.

Mr. Murphy instead suggested ending the second sentence after the words "Vienna Convention" and replacing "if it" with "The Court concluded that subsequent practice could only be found if such conduct".

Mr. Nolte (Special Rapporteur) said that the words "could only be found" did not accurately reflect the Court's judgment. He suggested that Mr. Murphy's structural change could be adopted if the words "if it" were changed to "The Court found that this would be the case if it".

Mr. Murphy said that such wording might still imply that the conduct of the local tribe constituted subsequent practice under article 31 (3) (b) of the 1969 Vienna Convention.

Ms. Oral suggested that the insertion of an explanatory footnote might clarify the matter for the general reader.

Mr. Murphy further suggested amending his earlier proposal so that the second sentence would end at "Vienna Convention" but the words "if it" would be replaced with "The Court concluded that subsequent practice could be found if such conduct".

Mr. Nolte (Special Rapporteur) agreed to that suggestion.

The Chair said he took it that the Commission agreed to amend paragraph (3) in line with the suggestion made by Sir Michael Wood, as further amended by Mr. Tladi, and the last suggestion made by Mr. Murphy.

It was so decided.

Mr. Ouazzani Chahdi said that, in the French version of paragraph (3), the verb "*estimer*" would better reflect the English word "consider" than "*juger*", which implied a judicial ruling.

Mr. Nolte (Special Rapporteur) said that, taking account of the amendments made to the English version of the text, the existing French terminology seemed appropriate.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

Paragraph (10)

Mr. Murphy, referring to the third sentence, proposed that the words "the possibility" should be inserted after the word "exclude" and that a new sentence break should be inserted after the words "functions of a State party". That second proposal would require the words "a State party may be" to be inserted after "For example" at the beginning of the new, fourth sentence.

Mr. Nolte (Special Rapporteur) said that, although he agreed with the second of Mr. Murphy's two proposals, he felt the first would overburden the text.

The Chair said he took it that the Commission wished to accept only the second of Mr. Murphy's two proposals.

It was so decided.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Murphy proposed deleting the words "practice of parties that is not 'in the application of the treaty' or" in the second sentence, as the Commission did not view "other conduct" as including such practice. In addition, as the Commission had decided, in draft conclusion 13, that it was not addressing the question of whether pronouncements of expert treaty bodies constituted conduct within the scope of the topic, he proposed that the words "or a pronouncement by an independent treaty monitoring body in relation to the interpretation of the treaty concerned" should also be deleted.

Mr. Nolte (Special Rapporteur) said that he did not agree with Mr. Murphy that practice of parties that was not "in the application of the treaty" was excluded from the topic. The title of the topic did not support that interpretation. He also did not agree that the Commission had excluded pronouncements of expert treaty bodies from the scope of the topic. They were indirectly relevant, as they could give rise to, or refer to, subsequent practice. Indeed, the judgment of the International Court of Justice in the *Ahmadou Sadio Diallo* case was quoted in the commentary to draft conclusion 13. Draft conclusion 5 did not stipulate that "other conduct" was not relevant, but merely that it did not constitute subsequent practice under articles 31 and 32 of the 1969 Vienna Convention.

Sir Michael Wood said that he agreed with the Special Rapporteur's explanation. In the context, it was perfectly correct to include a reference to pronouncements by independent treaty monitoring bodies. The current text of the paragraph was acceptable.

Mr. Jalloh said that he agreed with the Special Rapporteur that the pronouncements of expert treaty bodies had not been excluded from the scope of the topic and the reference to them should not be deleted.

Mr. Murphy, supported by **Mr. Rajput**, said that, although his personal view was that practice that was not "in the application of the treaty" was not relevant to the interpretation of the treaty, the Commission had not expressed a view on that point. As paragraph 2 of draft conclusion 5 stated that "other conduct" might be relevant when assessing the subsequent practice of parties to a treaty, practice of parties that was not "in the application of the treaty" should not be cited in the commentary as an example of such "other conduct". With regard to independent treaty monitoring bodies, the Commission had decided that the matter would be dealt with in a "without prejudice" clause.

Sir Michael Wood said that the "without prejudice" clause in draft conclusion 13 (2) applied only to that draft conclusion. Draft conclusion 5 (2) made it clear that, although "other conduct" did not constitute subsequent practice under articles 31 and 32 of the 1969 Vienna Convention, it might be relevant when assessing the subsequent practice of parties to a treaty. Pronouncements by independent treaty monitoring bodies could be very relevant, as they stimulated practice.

Mr. Tladi said that he agreed with Sir Michael Wood and Mr. Jalloh.

Mr. Šturma said that he shared the views of Sir Michael Wood, Mr. Jalloh and the Special Rapporteur. The reference to pronouncements by international treaty monitoring bodies was fully appropriate in the context.

Mr. Jalloh said that, in his view, the interpretation given by the Special Rapporteur and Sir Michael Wood was the correct one. He would urge the Commission to accept it.

Paragraph (11) was adopted.

Mr. Šturma, First Vice-Chair, took the Chair.

Paragraph (12)

Mr. Murphy proposed that the words "may only contribute to" in the last sentence should be replaced with "may only be relevant when" in order to reflect the language used in paragraph 2 of draft conclusion 5.

Mr. Nolte (Special Rapporteur) said that, if the Commission wished to accept Mr. Murphy's proposal, the word "only" should be deleted as well.

Mr. Rajput said that he saw no need to amend the original text.

Mr. Murphy said that the Commission had not used the words "contribute to" in draft conclusion 5 (2). He would not insist on keeping the word "only", although it did clarify the connection with the previous sentence.

Sir Michael Wood proposed that the words "may only contribute to" should be replaced with the exact language used in draft conclusion 5 (2), namely the words "may, however, be relevant when".

Paragraph (12), as amended, was adopted.

Paragraph (13)

Mr. Murphy proposed that, in order to bring the text of the third sentence into line with the agreed language of draft conclusion 5, the words "may be indicative of relevant practice" should be replaced with "may be relevant when assessing the subsequent practice".

Mr. Nolte (Special Rapporteur) said that he was prepared to grant Mr. Murphy that concession.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Mr. Murphy proposed that, in the first sentence, the words "may enjoy authority in the assessment of such practice" should be replaced with "may be useful in identifying such practice", as it was the interpretation of a report of an international organization, rather than the report itself, that might enjoy authority in the assessment of State practice in a particular field.

Mr. Rajput said that another alternative would be to use the words "may be useful in the assessment of such practice".

Mr. Jalloh said that a form of the verb "assess" should be used, as it was used in draft conclusion 5 (2).

Sir Michael Wood proposed that, in order to bring the first sentence into line with the Commission's earlier work, in particular the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, the term "international organizations at the universal level" should be replaced with "international organizations of a universal character".

Mr. Nolte (Special Rapporteur) said that, while he could accept Sir Michael Wood's proposal, he was reluctant to accept Mr. Murphy's. The first sentence stated only that reports by international organizations might enjoy authority "in the assessment" of State practice in a particular field. That was a sufficiently cautious way of reflecting the reality of the situation. He would prefer to retain the original formulation.

Mr. Rajput said that the word "authority" was the source of the problem. The Commission had not used that word in relation to independent treaty monitoring bodies in paragraph (11). In his view, Mr. Murphy's proposal would ensure that excessive weight was not attached to reports by international organizations.

Ms. Lehto said that she agreed with the Special Rapporteur's reasoning. An appropriate degree of caution was already ensured by the use of the word "may".

Mr. Saboia said that he supported the paragraph as it was currently drafted. The authority of a report by an international organization derived ultimately from the mandate on the basis of which it had been prepared. As Mr. Rajput had noted, the Commission had taken a different approach towards independent treaty monitoring bodies in paragraph (11). In his view, pronouncements by such bodies might enjoy authority in the assessment of State practice in a particular field. In relation to the term "international organizations of a universal character", he would appreciate clarification regarding where the use of that term would leave regional organizations, whose work was often cited by the Commission.

Mr. Jalloh said that he was persuaded by the arguments advanced by the Special Rapporteur, Ms. Lehto and Mr. Saboia. In his view, the current text of the paragraph was acceptable. Although he could see the merit of Sir Michael Wood's proposal to use the term "international organizations of a universal character", he, too, wondered about the work of regional organizations. He could see no reason for excluding relevant articles of the Constitutive Act of the African Union, for example, from an assessment of the practice of African States in specific contexts, such as the use of force or the duty to protect. For that reason, he wondered whether reference could not be made to the work of regional organizations.

Mr. Murphy said that the intention of his proposal had been to clarify that it was the interpretation of a report of an international organization that might enjoy authority in the assessment of State practice in a particular field. He had not been seeking to downplay the relevance of such reports. If the Commission wished to retain the word "authority", one solution might be to replace the words "in the assessment of" with "when assessing", which would ensure continuity with previous paragraphs of the commentary and the draft conclusion itself.

Sir Michael Wood said that, like Mr. Rajput, he found the word "authority" problematic. The Commission could certainly claim that reports by international organizations might be important when assessing State practice in a particular field, but the question of their authority was a separate one. He proposed that the words "may enjoy

authority in the assessment of such practice" should be replaced with "may be very important when assessing such practice".

The Chair said that another alternative would be to use the words "may play an important role in assessing".

Mr. Nolte (Special Rapporteur) said that he could accept Mr. Murphy's proposal to replace the words "in the assessment of" with "when assessing". With regard to the point raised by Mr. Rajput and Sir Michael Wood, his suggestion would be to qualify the word "authority" with the adjective "persuasive", which would indicate that reports by international organizations enjoyed an authority that was less than binding. With regard to the question of regional organizations, it would be possible to refer simply to "international organizations", rather than to "international organizations at the universal level" or "international organizations of a universal character", so that regional organizations would also be included.

Sir Michael Wood said that he was prepared to accept the proposal to refer simply to "international organizations". However, he was more reluctant to accept the insertion of the adjective "persuasive", as the expression "persuasive authority" suggested a certain legal or technical authority. There had been numerous cases in the English courts in which the question of the status of the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* had been discussed. By claiming that reports by international organizations might enjoy "persuasive authority", the Commission would be purporting to decide that question. He proposed that the words "may enjoy authority in the assessment of" should be replaced with "may be very important when assessing".

Mr. Jalloh said that, in his view, the use of the word "may" in the original text already reflected a sufficient degree of caution. He agreed with the decision to refer to "international organizations" generally rather than to those of a universal character specifically.

Mr. Saboia said that the phrase "may have weight when assessing" was another alternative.

Mr. Zagaynov said that, with regard to the word "authority", a good middle ground could be found in the proposals made by Sir Michael Wood and the Chair.

Mr. Park said that he supported Sir Michael Wood's proposal.

Mr. Ouazzani Chahdi said that, in the French text, it was stated that reports by international organizations might enjoy "some authority" [*une certaine autorité*]. That formulation made clear that the authority that they might enjoy was relative.

Mr. Nolte (Special Rapporteur) said that, although he could see the merit of the formulation "some authority", the very word "authority" would continue to pose a problem for some Commission members. He was prepared to accept Sir Michael Wood's proposal to replace the words "may enjoy authority in the assessment of" with "may be very important when assessing".

The Chair took it that the Commission wished to delete the words "at the universal level" and to replace the words "may enjoy authority in the assessment of" with "may be very important when assessing".

It was so decided.

Paragraph (14), as amended, was adopted.

The meeting rose at 6 p.m.